IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 23RD OCTOBER 2007 / 1ST KARTHIKA 1929

SA.No. 809 of 1994()
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AS.277/1988 of DISTRICT COURT,TRIVANDRUM
OS.279/1984 of I ADDL.SUB COURT,TRIVANDRUM
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APPELLANT/RESPONDENT nO.1 AND LEGAL REPRESENTATIVE OF RESPONDENT NO.2 /DEFENDANT 1 AND LEGAL REPRESENTATIVE OF DEFENDANT NO.2:
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1. SUMATHY, PUTHEN VEEDU, S.N.T.SADANAM, KUNNUKUZHY, THIRUVANANTHAPURAM.

2. KRISHNAMMA, VAYALIL PUTHEN VEEDU, MADATHUVILAKAM VILLAGE, THIRUVANANTHAPURAM

ADDL.APPELLANTS

3. DEEPA (MINOR), AGED 15 YEARS, T.C.12/1246, "EXCELSION", NEAR LAW COLLEGE, KUNNUKUZHY, THIRUVANANTHAPURAM REP. BY MOTHER AND NEXT FRIEND KRISHNAMMA, APPELLANT NO.2

4. DILIP (MINOR), AGED 13 YEARS, -DO- -DO- REP. BY MOTHER AND NEXT FRIEND KRISHNAMMA, APPELLANT NO.2

THE NAMES OF ADDITIONAL APPELLANTS 3 AND 4 ARE INCORPORATED AS PER ORDER DATED 26/9/1995 IN CMP 1200/95

BY ADV. SRI.G.UNNIKRISHNAN

RESPONDENT/APPELLANT/PLAINTIFF:
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AMBIKA, S.N.T.SADANAM, KUNNUKUZHY, THIRUVANANTHAPURAM

BY ADV. SRI.L.MOHANAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 23/10/2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ORDER ON C.M.PNO.1460/95 IN S.A.809/94

DISMISSED

23/10/2007

SD/-M.SASIDHARAN NAMBIAR,JUDGE.

//True copy//

PA to Judge.

**M.SASIDHARAN NAMBIAR,J.**

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S.A.NO. 809 OF 1994

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Dated 23rd October 2007

**J U D G M E N T**

Defendants in O.S.279/1984 before Additional Sub court, Thiruvananthapuram are appellants. Plaintiff is the respondent. On the death of first appellant, additional appellants 3 and 4 were impleaded as legal heirs. Plaint schedule property admittedly originally belonged to Narayanan. Respondent instituted the suit seeking a declaration of her status as daughter of Narayanan and for partition and separation of her share in the plaint schedule property. It was contended that Saraswathi, mother of respondent was originally married to Pachan and under Ext.A1 deed of dissolution that marriage was dissolved on 21/9/1120 M.E and thereafter Narayanan married Saraswathy and respondent was born in that wedlock on 18/5/1950 and she was educated and was given in marriage by Narayanan. It was also contended that subsequently Narayanan married first appellant and there were no issues in that wedlock and

on the death of Narayanan his rights devolved on first appellant and respondent jointly and respondent is entitled to get her half share in plaint schedule property separated and first appellant under Ext.A12 assignment deed sold the property in favour of second appellant, her brother and under Ext.A12 second appellant got only the share of first appellant. Suit was filed seeking declaration of her status and partition. First appellant in her written statement contended that Narayanan did not marry Saraswathy and respondent is not the daughter of Narayanan and she was treated as a daughter like the other children of Saraswathy and on the death of Narayanan respondent did not derive any right in the plaint schedule property and it vested only on first appellant and under Ext.A12 she transferred it to second appellant and therefore respondent is not entitled to the decree sought for. Second appellant in his written statement re-iterated the contentions of appellants and also contended that without setting aside Ext.A12, respondent is not entitled to seek a share and he purchased the property for valuable consideration and respondent is therefore not entitled to the decree.

2. Learned Sub Judge on the evidence of Pws.1 to 3, Dws.1 and 2 and Exts.A1 to A12 and B1 to B3 dismissed the suit holding that respondent failed to establish that Narayanan married Saraswathy and she was born in that wedlock and therefore she is not entitled to claim any share. It was found that even after divorce relationship of Pachan with Saraswathy continued. Respondent challenged the decree and judgment before District court, Thiruvananthapuram in A.S.277/1988. Learned District Judge on re-appreciation of evidence found that evidence establish that respondent is the daughter of Narayanan and Ext.A5 gift deed executed by Narayanan establish that appellant is the daughter and Ext.A2 S.S.L.C book of respondent and Ext.A3 marriage invitation letter of respondent also establish that Narayanan was her father. Therefore reversing the findings of learned Sub Judge appeal was allowed and declaring that respondent is the daughter of Narayanan she is entitled to half share in the plaint schedule property. A preliminary decree was passed. It is challenged in the appeal.

3. Appeal was admitted formulating following substantial questions of law.

1) Whether findings of first appellate court that respondent is the daughter of Kochummini Narayanan is vitiated by error of law.

2) Even if respondent is daughter of Narayanan, is she entitled to succeed to his assets in the absence of proof of any finding that Narayanan married Saraswathy before 10/3/1123, date on which Narayanan married first appellant.

3) Whether finding of first appellate court is vitiated due to absence of presumption regarding legitimacy available.

4. Learned counsel appearing for appellants and respondent were heard.

5. Argument of learned counsel is that there is absolutely no evidence to prove that Narayanan married Saraswathy, mother of respondent or that respondent is the daughter of Narayanan and hence finding of first appellate court is not sustainable. It was also argued that even though in the plaint it was pleaded that marriage of Saraswathy with Pachan was divorced under Ext.A1 and Narayanan thereafter married Saraswathy, even the date of marriage was not mentioned and no satisfactory evidence was adduced to prove that there

was a marriage. It was also argued that case of appellants was that in spite of divorce Pachan was living with Saraswathy and therefore respondent could only be the daughter of Pachan and fact that Narayanan was treating the children of Saraswathy as his children, as he and first appellant had no issues, cannot be taken as evidence to hold that respondent is the daughter of Narayanan. It was further argued that as respondent did not establish the marriage of Saraswathy with Narayanan, finding of first appellate court that respondent is the daughter of Narayanan and is entitled to equal share with first appellant is unsustainable. Learned counsel appearing for respondent argued that as distinct from other children of Saraswathy, Narayanan was treating respondent as his own daughter and as is clear from Ext.A5 gift deed executed by Narayanan, where respondent is referred as daughter of Narayanan in the gift deeds executed in favour of other daughters of Saraswathy namely, Vijayamma and Chandrika evidenced by Exts.B1 and B2 they are referred as only daughters of his elder brother. So also it was pointed out that when in the marriage invitation letter of respondent, she was referred as his daughter other children of Saraswathy

was referred in their marriage invitation letter sent by Narayanan as not his daughters but daughters of his brother and evidence of respondent and PW3 elder brother of respondent establish that respondent is the daughter of Narayanan. It was further argued that after Ext.A1 divorce, Pachan was living separately and Saraswathy was living with Narayanan and it was thereafter Narayanan married first appellant, evidenced by Ext.B2 and on the evidence first appellate court rightly found that respondent is the daughter of Narayanan and is entitled to a share and appeal is only to be dismissed.

6. It is admitted case that Saraswathy, the mother of respondent was originally married Pachan. Five children were born in that wedlock. They are Vijayan, Suseela, Thambi, PW3 Sivadasan and Chandrika. It was also admitted case that under Ext.A1 deed of dissolution, marriage of Pachan with Saraswathy was divorced on 21/9/1120 M.E. At that time Saraswathy was pregnant. Chandrika was born thereafter. It was also not disputed that Saraswathy had given birth to respondent on 18/5/1950. Though first respondent in the written statement contended that even after divorce Pachan was living with Saraswathy, there is absolutely no evidence

on that aspect. Even when first appellant was examined as DW2, she has no such case. When PW3 eldest brother of respondent was examined as PW3, he deposed that after the divorce Pachan had married another lady and Pachan had children in that marriage. This aspect was not denied by DW2 when she was cross examined. What was stated by DW2 was only that she is not aware of that marriage and not that Pachan did not marry another lady or was not living with that lady. Arguments of learned counsel appearing for appellants is that it was admitted by PW1 that Saraswathy was living till her death at Puchedivila and PW1 had also admitted that Pachan was residing at Puchedivila. But PW1 was not asked whether they are residing together or in the same house. Evidence of PW3 establish that Puchedivila is the name of a locality and more than 200 houses are there at that place. In such circumstances, it is futile to contend that Pachan was living with Saraswathy after Ext.A1 divorce. On the other hand, evidence of PW3, eldest son of Saraswathy establish that after the divorce, Pachan was living separately and Saraswathy was living along with Narayanan. Evidence of PW3 was that even the divorce was on account of the relationship of Saraswathy

with Narayanan and the reason shown in Ext.A1 was only a guise for getting a valid divorce and not the real cause.

7. It is to be born in mind that though it was contended that respondent is not the daughter of Narayanan, there was no specific case in the written statement that respondent is the daughter of Pachan. So also there was no case for appellants that respondent was the illegitimate child of Narayanan. There was only one case and that was she is not the daughter of Narayanan. Therefore, if the respondent is proved to be the daughter of Narayanan, she could only the legitimate daughter as there is no other case.

8. As rightly found by first appellate court, when in Ext.A5 gift deed executed by Narayanan respondent was referred as his own daughter, in Exts.B1 and B2 gift deeds executed by Narayanan in favour of the sisters of respondent Vijayamma and Chandrika respectively in 1962 and 1970, they were not referred as his daughters but as daughters of his brother. If, in fact, respondent is also a daughter of the brother of Narayanan and not his own daughter that fact would have been stated in Ext.A5 and respondent would have been

referred only as the daughter of his brother and not daughter of the executant as seen in Ext.A5. The distinction cannot be ignored as canvassed by learned counsel. Learned counsel then argued that said recital is only a mistake because there is no case for any of the parties that Narayanan has got any other child. Argument is that reference in Ext.A5 is that respondent is the youngest daughter and as there is no other child the recital could only be a mistake. Though reference about 'young' in Ext.A5 could be a mistake, the reference that she is daughter of Narayanan is consciously made and cannot be taken as mistake, in the light of other evidence. Ext.A3 is the invitation letter of marriage of respondent. There also Narayanan referred respondent as his own daughter and not daughter of his brother. At the same time in Ext.A8 invitation letter sent by Narayanan, for the marriage of Suseela, eldest sister of respondent she was referred as not his daughter but daughter of his brother. So also in Ext.A9 invitation letter sent by Narayanan, for the marriage of Chandrika, another sister of respondent and Ext.A10 marriage invitation letter sent by Narayanan for the marriage of PW3 elder brother of respondent and Ext.A11 marriage

invitation letter sent by Narayanan for the marriage of Vijayamma another sister of respondent they are referred only as son or daughters of his brother and not the daughter or son of Narayanan as we see in Ext.A3. This distinction also establish that respondent was not the daughter of brother of Narayanan as canvassed by appellant but daughter of Narayanan. In Ext.A2 S.S.L.C book also name of father of respondent shown as Narayanan and not Pachan. It is in the light of these evidence first appellate court found that Narayanan is the father of respondent. In such circumstances, question whether marriage of Narayanan with Saraswathy was proved or not assumes no importance. Even if it is necessary, evidence of PW3 the eldest son of Saraswathy establish that after Ext.A1 divorce Narayanan married his mother Saraswathy. In the light of the evidence, I do not find any merit in the appeal. Appeal is dismissed. No cost.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

**JUDGMENT**

S.A.NO.809 OF 1994

23rd October 2007

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